

No. 77-510

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NEW MEXICO*

**REPLY MEMORANDUM FOR
THE UNITED STATES**

WADE H. MCCREE, JR.,
Solicitor General,
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Respondent's Brief in Opposition, though relying principally on the opinion of the Supreme Court of New Mexico, advances three additional points that deserve brief comment.

1. Respondent contends (Br. in Opp. 17-18) that the petition for a writ of certiorari is premature because "[a]ll of the government's claims for water rights relating to watershed management and timber maintenance have not been adjudicated" (*id.* at 18). The decision of the New Mexico Supreme Court, however, has finally and conclusively determined the United States' claims to reserved water rights in the Gila National Forest for the purposes of recreation, minimum instream flows, and

stockwatering under federal permit programs. That determination, if not reversed, will bind the state district court on remand. Unless that decision is reviewed now, the parties will be required to complete the appropriation litigation without recognition of reserved water rights for these purposes; and then, if the present decision were later reversed, they would have to enter into a new round of proceedings in which these rights were taken into account. Meanwhile, denial of water to the United States for these important purposes could force discontinuance of federal programs and endanger fish resources in the forest. As "[n]othing that could happen in the course of the [proceedings on remand], short of settlement of the case, would foreclose or make unnecessary decision on the federal question" (*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480), and as the consequences of delaying review would be needlessly severe, prompt consideration by this Court is appropriate. See *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120; *Mills v. Alabama*, 384 U.S. 214.

2. Respondent asserts (Br. in Opp. 3-5) that the United States has misrepresented the record because, respondent suggests, the special master and the court below did not have before them the question whether the United States is entitled to maintenance of minimum instream flows for protection from fire and erosion.¹ This contention is incorrect. As the United States pointed out before the

¹Respondent also contends (Br. in Opp. 4) that the recreational purposes for which water is sought by the United States encompass more than hiking, camping, fishing, and hunting. However, the United States is not asking this Court to decide whether it is entitled to reserved water for *every* desired recreational purpose, but whether it is entitled to water for *any* recreational purpose. The extent of the reserved water rights for recreation is an appropriate subject for further proceedings after remand.

district court (Tr. of Record 374-375), the special master took judicial notice that live streams not only support fish life but serve other valid forest purposes, including erosion control, fire protection, watershed protection, and wildlife habitat protection.² The United States expressly urged that these purposes be incorporated in the findings of fact and conclusions of law (*id.* at 375-376). Instead, the district court concluded that "the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain" (Conclusion of Law 11; Pet. App. 21a). Likewise, the Supreme Court of New Mexico, after noting the United States' argument "that minimum instream flows are necessary for aesthetic, environmental, recreational and 'fish' purposes" (Pet. App. 6a-7a), stated: "We cannot agree * * * that these objectives come within the original intent of Congress when creating national forests" (*id.* at 7a). Thus, although the United States does claim a right to minimum instream flows for the purpose of preserving endangered fish life, its claim has not been limited to that purpose and has not been treated as so limited by the courts below.

3. Although the district court concluded that "where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom should be adjudicated to the permittee under the law of prior appropriation and not to the United States" (Conclusion of Law 9; Pet. App. 20a), respondent appears to suggest (Br. in Opp. 6, n. 4) that this determination applies only to "significant water uses as might be made with respect

²Thus, there is no merit to respondent's contention (Br. in Opp. 3) that the special master recognized the United States' right to minimum instream flows for "fish" purposes only.

to a ski resort or mining operation." The United States would welcome any limitation on a holding that it believes to be legally incorrect, but we note that the district court's conclusion on its face carries no such qualification. We therefore submit that, despite respondent's apparent concession, further review of this issue remains appropriate.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.